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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 444

ALBERT J. WILD, *Petitioner*,

v.

BENNETT Y. BREWER, Revenue Agent of the Internal Revenue Service, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondent's opposition to the petition herein is subject to serious infirmities. And because the Petitioner is currently under criminal income tax investigation by the Respondent, who seeks the disputed books and records solely for purposes of that criminal investigation,[1] and who may be convicted of a felony

[1] See the fourth point, *infra*, pp. 5-8, and R. 43-52.

and deprived of his freedom if Respondent obtains access to those records, the Court is asked to consider with special care the following reasons why Respondent's brief should not be given material weight.

1. First, an unnatural silence by Respondent has been the latter's response to Petitioner's contention that the issues herein raise important Fifth Amendment questions which have recurring effects on the administration of Internal Revenue Code criminal investigations by Special Intelligence Agents. Yet Respondent's counsel has already recognized the growing importance of the increasing litigation on such issues in the Annual Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1963, at page 331, wherein he reported to the Congress that:

> "The Tax Division has taken *additional* steps during the fiscal year to centralize the litigation involving the issuance of summonses by *special agents of the Intelligence Division* in order to insure that the litigation in this area does not delay the investigations by the Internal Revenue Service and to insure a consistent approach[2] to the *growing legal issues* raised in this field." (Italics supplied)

Therefore, since the Government has conceded the recurring nature of the issues and has created a particular section or group to cope with such cases, it would appear to be in its interests as well as the Petitioner's

[2] Probably this explains why the individual legal counsel for Respondent herein also appear for another Special Intelligence Agent in *Boughner* v. *Tillotson*, petition for certiorari pending, No. 434, this Term, in which the narrower issue of whether a Special Agent may issue a summons under Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602, is presented as the primary question.

for the Court to review one of the most important of those issues: Whether the sole stockholder of a corporation, currently under criminal income tax investigation, can be compelled by the Special Intelligence Agent investigating him, to produce the books and records of his corporation so that those records may be used against him, or whether the Fifth Amendment denies the Government such an inquisitorial sledge hammer.

2. Next, the Respondent's statement that *Grant* v. *United States*, 227 U.S. 74 (1913), "held" that the privilege was "unavailable even when the custodian was, as here, the sole stockholder of the corporation," is not dispositive, even if it were correct.[3] It is not dispositive in determining whether a writ should issue because this Court does not hesitate to re-examine its earlier decisions where important constitutional rights are involved. Among many such instances, the Court recently re-examined and rejected its earlier decisions respecting the application of the Fifth Amendment's privilege against self-incrimination to the States via the Fourteenth Amendment. *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964).

Here such re-examination is all the more desirable because, as was stated by Judge Madden herein, "The Court's decision [in *Grant*, *supra*,] was syllogistic." And, as further stated by Judge Madden:

> "I suggest that nothing which the Supreme Court has decided or said in the last two decades

[3] Not only did Respondent not even cite *Grant*, *supra*, to the court of appeals until after it had ruled against him, but a close reading of the opinion and briefs in *Grant*, *supra*, leaves a serious question of whether the issue herein was fully briefed and considered by the Court as the central issue therein.

can be reconciled with the view that a dry syllogistic approach could compel an individual to produce his own papers from his own possession to assist his government to convict him of crime. The language of the Court in *Ullman, supra,* in 1956; that of the Court in *White, supra,* in 1944, seems to me to say that the Court will not decide a question of the constitutional right of an individual on the basis of a dry syllogism such as that General Motors is a corporation and its president could not refuse to produce its records on the ground that they might incriminate him; Air Conditioning Supply Company is a corporation, therefore its president, though he is the sole owner of the corporation and its records, cannot refuse to produce its records.

The recent decisions of the Supreme Court, a few of which are Mapp v. Ohio, 367 U.S. 643 (1961); Gideon v. Wainright, 372 U.S. 335 (1963); Massiah v. United States, ... U.S. ....., 84 S. Ct. R. 1199 (1964), seems to me to make this court's decision in the instant case anachronistic."

Therefore, if *Grant, supra,* has any remaining validity in view of the policies and purposes of the Fifth Amendment as most recently expressed by this Court in *Murphy, supra* (378 U.S. 55), the Government will have an opportunity to state what it is upon review. To date it has not done so, but has merely cited *Grant, supra,* which, when applied to the facts of this case, means that a citizen who does business in the corporate form is deprived of one of his basic liberties as set forth in the Fifth Amendment.

3. Third, the Government has consistently, in recent years, urged the Court to review decisions involving the possible abridgement of constitutional rights by the States (e.g. re-apportionment and civil rights). Yet,

here, where the federal government itself is the aggressor in such a possible abridgement of a constitutional right, it opposes a review. But since the constitutional rights of a citizen against the federal government are certainly as important as those protecting him from the States, and it matters very little to a citizen whether he is locked up in a federal or a state prison, the Government's opposition to review is entitled to no more weight than the prior opposition of the States. The vested interest of the Government here (a free hand to convict a citizen with his own books and records) is no stronger than the prior vested interests of the States who similarly resisted a re-examination of earler decisions which gave them a free and heavy hand.

4. Fourth, although the Respondent has ostensibly not replied herein to Petitioner's statement, supported by the record herein, that he, as a Special Intelligence Agent, is seeking only to convict Petitioner of a crime and not to ascertain the latter's correct tax liability, the Government's statements in its opposition to the petition in *Boughner* v. *Tillotson*, No. 434, this Term, filed by the same counsel appearing herein, leave the very erroneous general inference that a Special Intelligence Agent also determines civil tax liability. That such is wholly incorrect is amply shown by Burns, *Searches and Seizures: The Suppression of Evidence*, N.Y.U. 20th Inst. on Fed. Tax. 1081, 1087 (1962): *United States* v. *Lipshitz*, 132 F. Supp. 519, 521 (E.D. N.Y.). These authorities, both of which were cited in the petition herein, were not responded to by the Government although Burns, a former Special Assistant to the Attorney General, categorically states:

> "Some courts have failed to realize the great distinction between the function of an Internal

Revenue Agent and a Special Agent. The Constitution gives the Government the right to collect taxes and Congress has enacted statutes containing various provisions to enable the Commissioner of Internal Revenue to investigate both civil tax liability and criminal offenses against the revenue. These are two separate and distinct functions, and he has set up separate and distinct divisions to carry out these functions. The function of investigating to determine civil tax liability has been assigned by the Commissioner to Internal Revenue Agents, who are in the Audit Division.

> The *sole* function of a Special Agent in the Intelligence Division of the Internal Revenue Service *is to seek evidence of crimes.* He has *no concern whatsoever* with the *amount* or *collection* of any additional tax, these being strictly the concern of the revenue agent. He is exactly the same as any other Treasury Agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. *A special agent is a criminal law enforcement* officer, *just like any other* state or municipal *detective* or *policeman.* He, like any other government agent who enforces the criminal law must obtain a valid search warrant." (Emphasis supplied.)

That is, the Special Agent is no different than an F.B.I. agent insofar as his purpose is concerned. Thus, the Court may properly ask itself whether it would review the decision below if the criminal investigation of Internal Revenue Code violations had been assigned to the F.B.I., and the Government was now contending that an F.B.I. agent was entitled to summon the sole stockholder of a corporation then under criminal investigation and require the stockholder to produce his corporation's books and records so they could be used to convict the said sole stockholder of a crime.

CONCLUSION

Petitioner submits that the time has come for the Court to entertain full argument on the question of whether the citizen accused of tax crime is not being deprived of constitutional rights which are accorded by this Court to those accused of murder, rape, treason, burglary and other felonies. Are not the rules of criminal procedure and constitutional rights which apply to other types of crimes equally applicable to those charged under the Internal Revenue Code? The Sixteenth Amendment gave the Government the right to levy and collect an income tax, but it did not also provide that the Fifth Amendment's protections were to be watered down in order to collect that tax. The needs of a revenue collection system are surely not so compelling that the spirit of the Fifth Amendment must be weakened, and a double standard created to deny those who are suspected of tax crimes the constitutional privilege against self incrimination.

For the reasons stated in the Petition, as well as herein, the issues set forth in the Petition should be reviewed and decided by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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